



## **An Insurance Overview for New Jersey Non-Profits**

The purpose of this article is to provide New Jersey non-profits with an up-to-date introduction guide to buying insurance: how to decide if you need insurance or not and, if so, how to purchase it wisely. This article will focus on general liability and directors' and officers' liability insurance, the two types most commonly needed by non-profits. It is by no means a specific legal opinion but rather is a primer for assessing your organization's exposure and covering your risks.

An organization's best defense against liability is to have in place policies and practices that reduce the non-profit's risks that a lawsuit will be filed. Non-profits need to make a priority of reducing their vulnerability to lawsuits, particularly in the employment arena, and addressing personnel policy problems as soon as they arise. Ensuring that the non-profit has adequate insurance protection is also of primary importance. Every non-profit should conduct a thorough evaluation of its policies, including its Directors and Officers insurance policies to confirm that key types of claims - especially those made by employees or former employees - are not excluded, and that the limits of liability are appropriate.

### **THE LAW**

#### **New Jersey Immunity Statutes**

The key statutory protection for many non-profits is New Jersey's charitable immunity law (N.J.S.A. 2A:53A-7 et seq.). Originally enacted in 1959, the law has been modified several times since then, most recently in 2006. In its current form, the law provides that a non-profit corporation organized exclusively for religious, charitable, educational or hospital purposes is not liable for damages arising from the ordinary negligence of someone acting on behalf of the non-profit if the person suffering those damages is a beneficiary of the organization's services - with certain important exceptions (see below).

Case law provides some guidance as to the kinds of organizations protected by this statute and the definition of "beneficiary." One revision to the law also extends immunity to "trustees, directors, agents, servants or volunteers," and to employees of organizations other than hospitals. The law does not cover independent contractors, hospital employees, or other health care professionals who are compensated for their services by non-hospital organizations. A more recent amendment removes certain obstacles to claims involving the sexual abuse of minors.

Another section of the immunity law (N.J.S.A. 2A:53A-7.1) provides that uncompensated volunteers, trustees and officers are not liable for damages related to their services on behalf of charitable non-profits, in cases of ordinary negligence. No distinction is made between recipients of the non-profits' services and strangers, meaning that unpaid trustees, officers and volunteers are covered in their individual capacities regardless of whether the person suffering damages is a beneficiary of the group's services.

## Exceptions to the Immunity Statutes

Although the immunity statutes provide broad protections for non-profits, important exceptions remain.

- The law provides immunity from damages, and therefore increases the likelihood that an organization will prevail in certain lawsuits. However, it ***does not prevent an organization from being sued*** and thus incurring legal defense costs.
- ***In no case does charitable immunity or trustee/volunteer immunity provide protection in cases of gross negligence or willful or wanton misconduct.*** There is no single definition that separates what constitutes simple negligence from gross negligence in this context, meaning that the distinctions are left for the courts to decide on a case-by-case basis. In addition, the exact scope of what kinds of organizations are covered and who is a "beneficiary" continues to be tested in the courts. A non-profit manager should take these factors, as well as the group's own potential liability exposures, into account when assessing its insurance needs.
- ***Employment law claims are not protected by immunity laws.*** Employment-related lawsuits may allege that the employer committed intentional wrongful acts (discrimination, wrongful discharge, defamation, breach of contract, intentional infliction of emotional distress, failure to hire, benefits and wage/hour disputes), which are not covered under the Charitable Immunity Act. According to insurance industry experts, employment law claims comprise the majority of all claims filed against non-profit organizations. This means that a non-profit's biggest liability risk is not shielded by the Charitable Immunity Act in New Jersey.
- ***Charitable immunity does not apply in lawsuits alleging sexual abuse.*** In 2006, the Charitable Immunity Act was amended to eliminate the charitable immunity defense in lawsuits filed against the charity for the sexual abuse of minors committed by "employees, agents or servants" of the organization. Such legal actions have a two-year statute of limitations. However, this two-year limitation on filing suit begins at the point where the victim "discovers" the abuse. This special provision was enacted because evidence suggests that minor victims of sexual abuse may feel inhibited to disclose it and thereafter suppress the memory. However, the law would allow a suit to be filed, say if the memory was retrieved later in life in a therapy session, as long as the suit was filed within two years of that time.
- ***The charitable immunity law provides different levels of protection for the charity as an institution and its uncompensated board members and volunteers as individuals.*** Charitable *organizations* may only be protected by charitable immunity if the injured person is a "beneficiary" of the charity's good works (again, with notable exceptions as indicated above). This leaves the charity open to lawsuits from the general public, and from employees, who are not defined as beneficiaries. Recently the issue of whether a volunteer could be a beneficiary was tested, and the New Jersey court concluded that volunteers are not necessarily beneficiaries. Consequently, the potential plaintiffs in a legal action against New Jersey's charities include the general public, employees, volunteers, and in cases of intentional conduct, beneficiaries.

In the case of board members and volunteers as *individuals*, charitable immunity applies only in cases of "simple negligence," and not to acts that constitute "gross negligence" or "willful or wanton misconduct." Because the distinction between simple and gross negligence has not been well defined by the courts, lawsuits may claim that the injured party was a victim of an act that exceeded the boundaries of the immunity protections. Regardless of the differing standards, if an organization has chosen to indemnify its trustees and officers, it may face significant expenses defending or paying damages arising from a lawsuit filed against a trustee.

- ***Injuries resulting from motor vehicle accidents are not covered under the Charitable Immunity Act.*** Therefore, any non-profit that transports anything or anyone risks liability as a result of any motor vehicle accident involving clients, staff or volunteers.
- ***The immunity statutes also do not shield charities from fines or penalties from violations of the law.*** As charities increasingly engage in fund raising ventures in partnership with for-profit organizations or via the Internet, each of these ventures, while potentially extremely rewarding, carries with it a significant liability risk. The charitable immunity laws do not protect charities from claimed violations of solicitation regulations, breach of contract or traditional commercial disputes.

### **The Federal Volunteer Protection Act**

Much publicity was recently given to the federal "Volunteer Protection Act of 1997," which was signed into law by President Clinton in June of 1997. The new law provides civil liability protection for non-profit or government volunteers under certain circumstances. The federal Volunteer Protection Act pre-empts existing state laws except those (like New Jersey's) that provide broader volunteer protection than the federal law. However, the new law does allow states to enact their own legislation to make the federal law inapplicable in a particular state. The federal statute allows states that have certain existing restrictions on volunteer immunity to retain those limitations without having to take the affirmative step to enact new legislation. (For a more detailed summary of the federal Volunteer Protection Act, visit [www.njnonprofits.org/vol\\_protect\\_act.html](http://www.njnonprofits.org/vol_protect_act.html) .

At the time of the Federal Volunteer Protection Act's passage in 1997, New Jersey already had broad immunity laws protecting uncompensated trustees, officers and volunteers, as well as charitable organizations, under specific conditions. These statutes exceed the breadth provided for in the federal law. Like the federal Act, New Jersey's immunity does not apply to acts of gross negligence, willful or wanton misconduct, or the negligent operation of a motor vehicle.

## **THE RISKS**

Given the legal framework of immunity and exposure, the basic liabilities of a non-profit fall into three categories: corporate, board/volunteer and staff.

Corporate risks will be those not eliminated by the immunity statutes, suits brought by staff or volunteers against the organization, or suits for damages suffered by third parties who were not beneficiaries of the non-profit's services. Corporate exposure also exists where the Certificate of Incorporation promises to indemnify trustees, staff and any other corporate agents in the event they incur losses because of their service on behalf of the non-profit.

Board and volunteer liability usually comes from hiring and firing decisions (discriminatory hiring, wrongful discharge), claims of gross negligence and willful or wanton misconduct, or from failure to oversee appropriately the functions of the organization. When an injured party sues a corporation, individual trustees are generally named in the suit as part of the group's governing body.

Staff risks are often professional "errors or omissions" or management mistakes, but can involve mishandling of funds or job-related injuries and auto accidents.

Miscellaneous exposures are also faced by non-profits that are involved in special events, either as performances, training or exhibits that carry out charitable purposes or as fund raising events. Certain organizations, such as those involved in housing, environmental protection and child care, will face specific exposures because of the nature of their activities. And for those non-profits considering business ventures, those will present new risks to be assessed.

## **INSURANCE COVERAGE**

Before buying any insurance, you need to know why you're buying it. Non-profits often purchase insurance to shield corporate assets and protect the people who are expending their energy, services and talents to further the group's mission. Some government agencies require their contractors to carry a certain amount of liability coverage. Your organization may have promised in its Certificate of Incorporation to indemnify board members. In all of these cases, a smart insurance buyer also needs to know not only the overall purpose for having a particular kind of insurance but also the liabilities or exposure the policies cover.

### **General Liability**

The keystone of an organization's coverage is the corporate multi-peril or general liability policy. This coverage includes many types of protection--the usual business risks for fire, theft, flood, premises liability, personal injury, libel/slander, possibly for liquor-related events, sometimes products/services liability and automobile coverage. Often these policies begin with a basic "special multi-peril" (SMP) package to which riders can be added such as endorsements for auto (either corporate- or non-corporate-owned), adding staff as additional insureds, medical payments in addition to personal injury coverage, business interruption and key-person insurance. Many of these more specialized coverages can also be purchased as separate policies.

### **Directors' and Officers' Liability (D&O)**

The prudent non-profit manager will consider purchasing insurance to protect board and staff, indirectly protecting the corporation that might have to indemnify them. Directors' and officers' (D&O) insurance covers the legal liabilities of the board discussed earlier. When staff members err, boards are often accused of negligent hiring or supervision, wrongful discharge, discriminatory practices, or other discretionary acts. Trustees may also be accused of breaching their duties to members of their new corporation. Even though laws may exempt the typical board from liability for ordinary negligence, this does not shield trustees from being sued and from incurring defense costs. And, as stated earlier, trustee immunity does not apply to acts of gross negligence. Most D&O policies do not exclude gross negligence, so be sure that such coverage is included in yours. Generally speaking with insurance, if a coverage is not specifically excluded, it's covered.

Read your policy to see if defense costs are covered. They may be included in your overall limits or stated as a separate limit, which results in more coverage for you.

You and your attorney must balance the expense of the insurance against the probability of your trustees or officers' being sued. Consider the activities of your organization, whether your trustees' acts are covered on their own homeowner policies, how many employees you have, and whether you can recruit a strong, effective board without offering the reassurance of a D&O policy. Asking volunteers to risk

their personal savings while serving as trustees or officers may be unrealistic; thus, D&O insurance may be an important factor in healthy board/staff relationships and essential to the governance of your organization. Also, if the corporation has promised to pay its trustees back for any losses they've incurred due to their board service, D&O may be necessary to protect the corporation's funds.

The major types of liability insurance coverage related to staff and direct service volunteers are professional liability, workers' compensation, and bonds of specific acts.

## RESOURCES

All of the policies described in the preceding paragraphs vary in the limits of coverage, deductibles, inclusions such as defense costs, and exclusions such as child abuse or special performance events. Before purchasing, you should know whether your funding sources require you to have specified amounts or types of coverage. You should know if you're operating with a "claims-made" policy which covers you only if your insurance was in effect when the claim was made against your organization, or if you have an "occurrence" policy which will provide coverage at any time if the policy was in effect when the event which eventually gave rise to the claim occurred. Many professional liability insurance policies are written on a claims-made basis.

Often, group plans, such as the D&O program for Center members, and a little bit of research can translate into considerable savings for your organization. Discussing insurance with fellow non-profit leaders can often result in improvements in carrier or coverage. Consultants in risk assessment and management can be hired to help make your operation physically safer or less open to claims.

Two other valuable resources are:

- the ***Nonprofit Risk Management Center***, a non-profit research and education center regarding insurance and risk management issues for community-serving organizations. The Nonprofit Risk Management Center offers a wide array of useful publications and can be reached on the Web at [www.nonprofitrisk.org](http://www.nonprofitrisk.org).
- ***Alliance of Nonprofits for Insurance, Risk Retention Group*** (ANI), a 501(c)(3) organization providing liability insurance for non-profits in 20 states, including New Jersey. ANI-RRG makes a wide variety of resource materials and publications available on its Web site at [www.ani-rrg.org](http://www.ani-rrg.org).

The goal of this article has been to promote intelligent insurance decisions. Only by knowing where your volunteers, staff and corporation are exposed will you be able to judge the advice you get from insurance sales representatives. Remember, you should be able to get reliable, honest information from him/her to help you understand your present coverage or any proposed policies and how they relate to your organization's needs.

Before making significant changes in your insurance coverage, consult your attorney and make your decision in the context of all of the factors discussed above.

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*The content of this article is for general informational purposes and does not constitute legal advice or a legal opinion. For answers to specific questions concerning your situation, you should consult a knowledgeable attorney who can advise you regarding your particular circumstances.*

(Last reviewed/updated 3/2012)